

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ESTEBAN LEON COLON,

Defendant-Appellant.

UNPUBLISHED
September 4, 2003

No. 239769
Oakland Circuit Court
LC No. 88-085541-FH

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals by right his conviction and sentence for probation violation alleging his due process rights were violated because he did not have an interpreter when he plead guilty to his original charges. We affirm defendant's conviction but remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On September 7, 1988 defendant pleaded guilty of delivery of more than fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and was sentenced to lifetime probation. In 2001 defendant was charged with violating his probation after he plead guilty to three counts of criminal sexual conduct in the first degree, MCL 750.520b, and three counts of criminal sexual conduct in the second degree, MCL 750.520c. After a hearing, the trial court ascertained that defendant had an interpreter when he pleaded guilty to the criminal sexual conduct charges. The trial court found defendant guilty of violating his probation and sentenced him to ten to twenty years in prison to be served consecutively to the sentence defendant was currently serving.

On appeal defendant argues that he was denied due process in the underlying controlled substance matter because he did not have an interpreter present during the plea proceeding.¹ MCL 775.19a. This issue is not properly before us because this appeal is only from defendant's conviction of probation violation, and is limited to matters relating to the probation violation and

¹ During the probation violation hearing, defendant contended that he did not have an interpreter during the plea proceeding for the criminal sexual conduct cases. Defense counsel informed the trial court that defendant's attorney in that matter confirmed that an interpreter had been present at the plea hearing.

the hearing on it. Defendant is precluded from challenging his underlying conviction at this point. *People v Pickett*, 391 Mich 305, 316; 215 NW2d 695 (1974).

When probation is revoked and a defendant is sentenced for the underlying offense, it is as though the sentence of probation was never imposed. *People v Burks*, 220 Mich App 253, 258; 559 NW2d 357 (1996). Defendant committed the offense on March 2, 1988, when it carried a mandated sentence of not less than ten years nor more than twenty years in prison, or lifetime probation. Before defendant pleaded guilty and was sentenced on September 7, 1988, MCL 333.7401(2)(a)(iii) had been amended. The amended statute mandated a minimum term of not less than five years nor more than twenty years in prison, but provided that the sentencing court could depart from the mandated minimum term if it found that substantial and compelling reasons existed to do so. MCL 333.7401(4). Plaintiff concedes that following his conviction of probation violation, defendant was entitled to be sentenced under the ameliorative version of the statute in effect at the time of his original sentencing on September 7, 1988. See, e.g., *People v Schultz*, 435 Mich 517, 530-531; 460 NW2d 505 (1990).²

Accordingly we affirm, defendant's conviction of probation violation, but remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad

² The penalties provided for in MCL 333.7401(2)(a)(iii) have been changed on several occasions since September 7, 1988. This case involves the imposition of a sentence following a conviction of probation violation; therefore, the version of the statute in effect at the time of the original sentencing is the relevant version for purposes of this appeal. *Burks, supra*.